

another ground. In making the application to set aside the judgment of the magistrate the appellant had failed to base his application on the irregularities of the proceedings. He however based his application on his having a good defence and that the case had been referred to arbitration.

In the appeal before me a fresh point of law that is the irregularities of the proceedings was raised in addition to the other two grounds. In this respect I would quote the case of *Rengasamy Pillai v. Comptroller of Income Tax*⁽³⁾ wherein Lord Diplock stated *inter alia* —

"As has been repeatedly stated it is not the practice of their Lordships, save in very exceptional cases, to allow a fresh point of law to be argued without the benefit of the judgment in the court below..."

Accordingly I dismissed this appeal with costs. I also ordered the deposit of \$150 made by the appellant in this appeal to be paid to the respondents as part of the costs.

Appeal dismissed.

Solicitors: *Nahappan, Muthu & Peri; Pasupathy & Co.*

PUBLIC PROSECUTOR v. SANDRA MARGARET BIRCH

[R.Cr.J. (Arulanandom J.) August 27, 1976]

[Penang — Arrest Case No. PG 207/1976]

Criminal Law and Procedure — Scope of s. 27 of the Evidence Act, 1950 — Whether statement of accused in the course of police investigation could be admissible under provision of s. 27, Evidence Act — Criminal Procedure Code (F.M.S. Cap. 6), s. 113 — Courts of Judicature Act, 1974, s. 35.

Evidence — Statement in the course of police investigation — Whether admissible under s. 27, Evidence Act, 1950.

The Deputy Public Prosecutor sought to be admitted a statement by the accused that subsequently led the police to the drugs. The learned President, Sessions Court held the view that any statement or information given must fulfil the requirements of section 113 of the Criminal Procedure Code and that by implication section 27 of the Evidence Act was no longer in force. Accordingly, he ruled that the accused's statement was inadmissible.

Held, reversing the lower court's decision: all statements if they fall within the province of section 27 of the Evidence Act are admissible in the courts of law. Such admissions are not repugnant to the amended section 113 of the Criminal Procedure Code.

Cases referred to:-

(1) *R. v. Ramasamy* [1934] 3 W.L.R. 632 (P.C.), 639.

(2) *Pulukuri Kottaya v. King-Emperor* (1946-47) L.R. 74 I.A. 77.

DIRECTION UNDER SECTION 35 OF THE COURTS OF JUDICATURE ACT.

Arulanandom J.: My attention was drawn to a report in the *New Straits Times* of Thursday, August 19, 1976, about the conduct of a criminal case in the Sessions Court, Penang on August 18. According to the report the Court President ruled that section 27 of the Evidence Act was abrogated by the amendment to section 113 of the Criminal Procedure Code. The exact words used in the report were as follows:—

A "DPP Ghazi Ishak then applied to Sessions Court President Christopher Fernando to admit a statement by Birch that subsequently led police to the drugs.

The DPP said the court could hold a trial within a trial to determine if the statement was admissible.

Defence counsel Mr. Karpal Singh, assisted by Mr. K. Kumaraendran said that under the new amendment to section 113, of the Criminal Procedure Code, no statement of an accused could be admitted as evidence, if no caution had been administered.

The court president ruled Birch's statement inadmissible. He said that section 27 of the Evidence Ordinance was abrogated by the amendment to section 113 of the Criminal Procedure Code."

C As in my opinion the ruling was positively wrong I exercised my powers under section 35 of the Courts of Judicature Act and called for the records of the case.

Section 35 of the Courts of Judicature Act gives the High Court general supervisory and revisionary jurisdiction over all subordinate courts, and, if it appears desirable in the interests of justice at any stage in any matter or proceeding in any subordinate court, the High Court may call for the record thereof and may remove the same into the High Court or may give to the subordinate court such directions as to the further conduct of the same as justice may require.

The records do not repeat the words which appeared in the newspaper but a general reading of it makes it abundantly clear that that was the view that the learned President held. The record reads as follows:—

E "DPP applies that the court admit a statement made by the accused which led to the recovery of the exhibit 2 under section 27.

Tan Hung Song v. R. [1951] M.L.J. 181 is a guide as far as section 27 is concerned.

F Mr. Karpal Singh replies. Amendment to section 113 — there must be a caution — otherwise the statement is not admissible.

To 2.15 p.m. continued. (H)

DPP requests that he makes further submission.

In order to understand the amended section 113 — The old section states etc. . . section 27 has not been repealed — That was not the intention of the legislature.

G Mr. Karpal replies — The amendment to section 113 is clear — It talks about a statement — There are no exceptions — The statement ought to be excluded.

Ct. I rule that the amendments to section 113 requires 2 things:

(1) before arrest the Ct. must be satisfied that no threat, inducement or promise was used.

(2) after arrest a proper caution ought to be administered."

H Although it is not stated in the record, it is quite clear that the statement was not admitted as the learned President held the view that any statement or information given must fulfil the requirements of section 113 of the Criminal Procedure Code and that by implication section 27 of the Evidence Act was no longer in force. Section 27 of the Evidence Act is a section which stands by itself in the Evidence Act. The section is based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information is true, which accordingly can be safely allowed to be given in evidence.

The confusion seems to have arisen because of the wording of the old section 113 of the Criminal

Procedure Code. Whether it was actually in the mind of the President or caused by persuasion on him, I am unable to say. The old section 113 of the Criminal Procedure Code imposed an absolute prohibition of the use of any statement made by any person to a police officer in the course of police investigation. In view of the absolute prohibition, sub-section (3) of the old section 113 stated that nothing in that section shall be deemed to apply to any statement made in the course of an identification parade or falling within sections 27 and 32A of the Evidence Act. The reason for this sub-section being part of section 113 of the old Code is obvious. It was there to avoid difficulties which could arise when evidence was led under section 27 of the Evidence Act through an interpretation of section 113 as completely prohibiting anything by any person said to a police officer in the course of police investigation.

In fairness to the President, it must be stated that section 27 of the Evidence Ordinance has often caused confusion in the courts where criminal procedure was based on the Code of Criminal Procedure in India. The group of sections in the Evidence Act of India were sections 25, 26 and 27 (similar to our Evidence Act), first appeared as part of the Code of Criminal Procedure of 1861 of India, being sections 148, 149 and 150 of that Code. In 1872 they were taken out of the Code of Criminal Procedure and enacted separately as sections 25, 26 and 27 of the Evidence Act of that year. The section in the Indian Criminal Procedure Code corresponding to our Criminal Procedure Code section 113 was section 162. When in 1872 section 27 was transferred to the Evidence Act there was a specific saving inserted in section 162 for the operation of section 27. This saving continued to appear until 1898 when on amendments made to the Indian Criminal Procedure Code it was removed from section 162. However in recent years the express saving of section 27 has been restored to the Indian Code.

Viscount Radcliffe in *R. v. Ramasamy*⁽¹⁾ states:

"In the period that intervened between 1898 and the restoration of that saving the Indian courts must frequently have been brought up against the problem of the impact of section 162 upon section 27. No final solution, however, was ever established, although the balance of authority seems to have been regarded as inclining in favour of treating section 27 as an exception from section 162, even without any saving words."

In the same case the question of section 27 of the Evidence Act was considered in relation to sections in the Criminal Procedure Code relating to statements made by accused to the police and their admissibility, with or without formalities. In that case the question of the admissibility of evidence under section 27 of the Evidence Act of Ceylon was considered in relation to section 122 of the Ceylon Criminal Procedure Code which was similar to our old section 113 but without the saving of section 27 of the Evidence Act. It was held by the Privy Council reversing the decision of the Court of Criminal Appeal that:—

"(1) that the prohibition imposed by the opening sentence of section 122(3) of the Criminal Procedure Code of using 'statements' to a police officer applied to both written records and oral statements and extended to an accused person as much as to any other witness. What was intended was that, except for the limited purposes specified, statements made by a person under the special conditions of a police investiga-

tion were not to be used against him in any form. Accordingly, section 122(3) covered the use of oral evidence of statements made during a police investigation just as much as the written records of such statements (post, pp. 643, 644).

Reg. v. Buddharakkita Thera (1962) 63 N.L.R. 433 approved. *Rex v. Jinadasa* (1950) 51 N.L.R. 529 disapproved.

Pakala Narayana Swami v. King-Emperor (1939) L.R. 66 I.A. 66 considered.

(2) In deciding what, if any, effect section 122(3) of the Code of Criminal Procedure as above construed had on section 27 of the Evidence Ordinance it was necessary to look for guidance in a wider field than that of section 122(3) itself, and to apply the maxim of interpretation *generalia specialibus non derogant*. On that basis the evidence falling within section 27 — the words admitted must be limited to and relate distinctly to the fact — could lawfully be given at a trial though it would otherwise be excluded as a statement made in the course of an investigation under section 122 of the Criminal Procedure Code (post, pp. 645, 646, 647, 650).

Accordingly, applying the above principles of law, the police officer's evidence as to the information leading to the discovery of the gun was properly admitted under section 27 of the Evidence Ordinance and the conviction had been wrongly set aside by the Court of Criminal Appeal (post, p. 649).

Order of the Court of Criminal Appeal (1962) 64 N.L.R. 433 set aside, the verdict of the jury restored, and the appeal remitted to the Court of Criminal Appeal for hearing of the respondent's appeal against sentence."

The amended section 113 of our Criminal Procedure Code does not contain any absolute prohibition of statements made to the police during police investigations. The amended section 113 only refers to statements made by persons charged with any offence and it enables such statements, whether they are confessions or not, to be used provided certain formalities are observed. This section stands by itself and does not in any way affect section 27 of the Evidence Act and both sections stand independently of each other and are valid in law. The main difference between statements under the amended section 113 of the Criminal Procedure Code and section 27 of the Evidence Act is that the amended section 113 applies to whole statements, whether they are confessions or not, while section 27 only makes admissible so much of that information received from a person accused of an offence in the custody of a police officer as relates distinctly to the fact thereby discovered. What is admissible under section 27 has been thoroughly examined and considered in the Privy Council judgment in *Pulukuri Kotayya v. King-Emperor*⁽³⁾ where their Lordships clarified its exact meaning as follows:—

"In their Lordships' view it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, that fact discovered is very relevant. But if to the statement the words be added, 'with which I stabbed A', these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

Therefore, the amended section 113 of the Criminal Procedure Code and section 27 of the Evidence Act standing quite independently of each other, the amend-

ed section 113 does not make any reference to section 27 of the Evidence Act. For this reason section 27 of the Evidence Act is neither abrogated nor repealed by implication. All statements if they fall within the province of section 27 of the Evidence Act are admissible in the courts of law. Such admissions are not repugnant to the amended section 113 of the Criminal Procedure Code. I therefore direct the learned President to reconsider the application of the learned Deputy Public Prosecutor to admit under section 27 of the Evidence Act a statement made by the accused in the course of police investigation and consider its admissibility either as a whole or in part wholly under the provision of section 27 of the Evidence Act. If it is necessary to recall any witnesses to reconsider the application of the learned Deputy Public Prosecutor the President shall be at liberty to recall them. The trial shall then proceed on the basis of this direction to its normal conclusion.

If any question arises as to the legality of this direction it shall await the outcome of the trial and be brought before the higher courts in the usual manner by way of appeal.

I make this direction as I consider it desirable in the interests of justice to do so, for, allowing a ruling such as the President's to abide in the Subordinate Courts would lead to considerable mischief in the prosecution of criminal trials therein and result in the complete miscarriage of justice. Judgments and orders as a result would not be a true reflection of the guilt or innocence of accused persons, prosecutions in Subordinate Courts would become a mockery and the courts would not be discharging their duty to society in a just and responsible manner.

Order accordingly.

PACIFIC AND ORIENT UNDERWRITERS (M) SDN. BHD. v. CHOO LYE HOCK

[O.C.J. (Abdul Hamid J.) December 15, 1976]
[Kuala Lumpur — Civil Suit No. 1697 of 1975]

Insurance — Motor insurance — Policy — Basis of contract — Agency — Construction of declaration — Evidence Act 1950, ss. 91 and 92.

This was an application by the plaintiffs to declare a policy of insurance in respect of a vehicle issued by them void *ab initio*. The grounds were, *inter alia*, that incorrect particulars were given by the proposer as to his occupation and address and that the particulars provided became a term of the contract of insurance by virtue of a basis declaration in the proposal form, to the effect that all the particulars are declared to be true and that they form the basis of the contract and further that any person who wrote the answers on the form did so as the agent of the proposer. In this case the form was filled in English and the proposer only spoke in Chinese to the issuing agent who filled in the form for him.

Held, dismissing the application: (1) in this case the statements concerning the address and occupation could not be regarded as answers to the questions appearing in the form;

(2) the respondent's statement of his address and occupation could not form the basis of the contract and therefore sections 91 and 92 of the Evidence Act could not apply;

(3) in this case the agent who filled in the form was not the agent of the respondent but that of the applicants;

(4) in the circumstances the application could not succeed and the applicants were disentitled to avoid the same.

A Cases referred to:-

- (1) *China Insurance Co. Ltd. v. Ngau Ah Kau* [1972] 1 M.L.J. 52.
- (2) *Facer v. Vehicle & General Insurance Co. Ltd.* [1965] 1 Lloyd's Rep. 113, 120.
- (3) *Newsholme Brothers v. Road Transport & General Insurance Co. Ltd.* [1929] 2 K.B. 356.

B CIVIL SUIT.

Ong Chin Beng for the plaintiffs/applicants.

James Leslie Ponniah for the defendant/respondent.

Abdul Hamid J.: The Pacific and Orient Underwriters (M) Sendirian Berhad, the applicants/plaintiffs, have asked for a declaration that the policy of insurance No. 1043/PC/035460 in respect of motor car Toyota Corolla 1973 model registration number NE 8332 issued by the applicants to the respondent Choo Lye Hock was void *ab initio* and that the applicants are and at all material times entitled to avoid the same.

The applicants alleged that the respondent made a declaration to the effect that the answers in the proposal form are in every respect true and correct and if such answers are in the writing of any other person such person shall be deemed to be the respondent's agent for the purpose of filling the said proposal form and that the respondent also agreed that the declaration therein shall be the basis of the contract of insurance between the respondent and the applicants.

It is contended that the respondent made untrue statements in the proposal form in respect of (a) occupation, and (b) address (page 6 of the Bundle of Documents (BD)) when he stated his occupation as "timber merchant" and the address as "84, Cumming Road Seremban."

The applicants have stated that after investigation it was found that the respondent was only an employee at a plywood factory and there was no such address as 84 Cumming Road Seremban.

On the law counsel for the applicants cited the decision of the Federal Court in the case of *China Insurance Co. Ltd. v. Ngau Ah Kau*⁽¹⁾ where it was held that:

"(1) the answers to the questions had become terms of the contract of insurance and by reason of sections 91 and 92 of the Evidence Ordinance it was not open to plaintiff to adduce oral evidence to contradict, vary or add to or subtract from them; (2) the truth of the answers had been made a condition of the policy and it was not open to the trial judge to consider the question whether the answers to these questions were material or not."

It is therefore submitted that in the instant case the respondent is not entitled to introduce extraneous evidence to contradict or vary the written statements. As regards the respondent's allegation that he did not fill in the proposal form it is pointed out that the person who filled in the form was the respondent's agent. The applicants referred to the case of *Facer v. Vehicle & General Insurance Company, Ltd.*⁽²⁾ where Marshall J. found that the agent there was the agent of the insured. In that case Marshall J. regarded the case of *Newsholme Brothers v. Road*